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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

WILLIAM R. MCLENAGAN,

Petitioner,

V.

JOHN C. KARNES,
LORETTA SMITH and
ANDREW J. WINSTON,

Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Petition presents the following questions, all relating to the issue of whether a police officer and a deputy sheriff are entitled to protection afforded by the doctrine of qualified immunity:

1. Can a police officer reasonably believe he has probable cause, as a matter of law, to use deadly force without first observing something giving the appearance of a deadly weapon in the hands of the person he is about to shoot?

2. Is a deputy sheriff whose sole duty it is to maintain custody of prisoners at an arrest location and transport them to the city lockup performing a discretionary function entitling her to the protection afforded by the doctrine of qualified immunity?

3. Does an individual fail to state a claim against a deputy sheriff pursuant to 42 U.S.C. §1983 as a matter of law when the deputy's actions violated clearly established law and caused the individual to be subjected to a deprivation of his constitutional rights by another police officer?

4. Does the doctrine of qualified immunity afford protection to an individual who fails to act when their job requires them to take action?

5. Did the Fourth Circuit Court of Appeals properly find that the Petitioner's pendant state law claims were, as a matter of law, "patently without merit?"

LIST OF PARTIES

A. Plaintiff/Petitioner

William R. McLenagan:

A citizen of the United States residing in Richmond, Virginia who was shot by Richmond Police Officer John C. Karnes.

B. Respondents/Defendants

1. John C. Karnes:

   A City of Richmond police officer who shot William R. McLenagan.

2. Loretta Smith:

   A deputy sheriff for the City of Richmond who allowed an arrestee to escape from her custody.

3. Andrew J. Winston:

   Sheriff of the City of Richmond who is charged with the duty of training deputy sheriff Smith.

C. Additional parties appearing in the District Court as Defendants, but not involved in the Fourth Circuit Court of Appeals are as follows:

1. City of Richmond Police Chief Marty M. Tapscott

2. City of Richmond Police Captain Thomas Shook

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In The
Supreme Court of the United States
October Term, 1994

WILLIAM R. MCLENAGAN,

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JOHN C. KARNES,
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Petition for a Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

On June 30, 1994, the Fourth Circuit Court of Appeals issued a written opinion reversing the District Court's ruling concerning the denial of summary judgment to Respondents/Defendants John C. Karnes, Deputy Sheriff Loretta Smith

and Sheriff Andrew J. Winston. The case was remanded to the District Court with instructions to enter summary judgment in favor of these Defendants on all claims asserted.[1/] The case is reported at 27 F.3d. 1002 (4th Cir. 1994).

JURISDICTION OF THE COURT

Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. §1254(1). The decision of the Fourth Circuit Court of Appeals was issued June 30, 1994 and took effect on July 21, 1994, pursuant to a mandate issued by the Court of Appeals. No rehearing was sought in the Court of Appeals, nor was

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1/The District Court entered Orders concerning its decisions on a Motion to Dismiss and the Motion for Summary Judgment, but no formal opinion was issued.

an extension of time requested in this Court for the filing of this Petition.

AUTHORITY FOR CLAIM

In support of his claims, William McLenagan relies upon the following Constitutional provisions, Federal and State statutes, and the Virginia common law:

1) "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." U.S. Const. Amend. 4.

2) "No person shall be...deprived of life, liberty or property, without due process of law...." U.S. Const. Amend. 5.

3) "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law...." U.S. Const. Amend. 14 §1.

4) "Every person who, under color of any statute, ordinance, regulation, or usage, of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party

injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia." 42 U.S.C. §1983.

5) "Officers...constituting the police force of counties, cities, and towns of the Commonwealth are hereby invested with all the power of authority which formally belonged to the office of constable at common law in taking cognizance of, and enforcing the criminal laws of the Commonwealth and the ordinances and regulations of the county, city or town respectively, for which they are appointed or elected. Each policeman shall endeavor to prevent the commission within the county, city or town of

offenses against the law of the Commonwealth and against the ordinances and regulations of the county, city, or town; shall observe and enforce all such laws, ordinances and regulations; shall detect and arrest offenders against the same; shall preserve the good order of the county, city or town; and shall secure the inhabitants thereof from violence and the property therein from injury..." Va. Code §15.1-138.

STATEMENT OF THE CASE

After being arrested at a drunk driving checkpoint on the RMA Turnpike in the City of Richmond, Virginia, during the early morning hours of May 10, 1992, William R. McLenagan, hereinafter "McLenagan", your Petitioner, was placed in the custody of Respondent, Richmond

Deputy Sheriff Loretta Smith, hereinafter "Smith", for the purpose of being transported to the Richmond City Jail. App. at A-13-15. McLenagan was held in a room with two other arrestees, Robert Lloyd and Lamont Keir, both of whom were also in the custody of Smith at the time, and were handcuffed in front of their respective bodies. App. at A-14-15,A-19,A-35. One of the other individuals in the room with McLenagan was permitted to wander off from Smith's custody, [2/] exit the room where he was being held, and enter an adjoining room which was being used by the magistrate for processing the necessary paperwork for the individuals arrested at the checkpoint. App. at A-17-20. Smith knew

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2/It was later determined that the individual who escaped from Smith's custody was Lamont Keir.

there was a gun in a holster on top of a coffee can, which was on top of a table in open view in the magistrate's office. App. at A-20. The gun had been left unattended by the magistrate when she went out to smoke a cigarette. App. at A-20. Smith did not realize that one of the individuals in her custody had left the room until she heard a chair sliding in the magistrate's office. App. at A-20. Smith never attempted to physically stop the individual from leaving the room, nor did she shout any commands at him, such as "freeze", "stop", or "don't move". App. at A-30. Upon realizing what was occurring Smith panicked, left her post and the other two individuals in her custody, and ran from the room as fast as she could screaming, "the man got a gun", without ever actually observing a gun in the escapee's

hands. App. at A-20-21, A-31. There were two other deputy sheriffs in the men's room, directly across the hall from where Smith was, who upon hearing Smith screaming, drew their weapons, and moved into the hall just outside of the room where Smith had been. App. at A-15-16.

When Smith ran down the hallway screaming hysterically, she passed Respondent John C. Karnes, hereinafter "Karnes" who was going in the same direction. After Smith fled the room, McLenagan, who was also handcuffed in front of his body, ran out the door and down the hallway following Smith toward Karnes. App. at A-15-16. Karnes unholstered his weapon when Smith went by, wheeled around, and observed McLenagan coming down the hallway. App. at A-39. Karnes was able to see McLenagan's hands and admits that he did

not see a weapon in his hands. App. at A-41, A-47. Notwithstanding this observation, Karnes shot McLenagan once and almost fired at him a second time, causing severe injuries to McLenagan's hands and abdomen. App. at A-39, A-48. When Karnes realized he shot the wrong person, he cursed, then proceeded down the hallway and fired two additional shots at a closed door, without even being able to see who if anyone was inside. App. at A-43-44. Karnes was subsequently ordered out of the building by a superior officer.

McLenagan filed suit in the U. S. District Court for the Eastern District of Virginia, against City of Richmond Sheriff Andrew J. Winston, hereinafter "Winston", City of Richmond Deputy Sheriff Loretta Smith, City of Richmond Police Chief Marty M. Tapscott,

City of Richmond Captain Thomas Shook and City of Richmond Police Officer John C. Karnes, claiming violations of the Fourth, Fifth and Fourteenth Amendments of the United States Constitution, §42 U.S. §1983 as well as state law claims of gross negligence and assault and battery. All defendants moved for summary judgment on the basis of qualified immunity.[3/] The District Court granted Tapscott and Shook's Motions for Summary Judgment and dismissed all claims against them. The remaining §1983 claims against Karnes and Smith and the state law claims against Winston, Karnes and Smith were not dismissed.

3/Winston and Smith had filed a 12(B)(6) Motion to Dismiss prior to their Summary Judgment Motion and the District Court dismissed only the 42 U.S.C. §1983 claims against them in their official capacities.

Winston, Karnes, and Smith appealed the District Court's decision denying their motion for summary judgment.[4/] The Fourth Circuit Court of Appeals reversed the District Court's ruling and remanded the case with instructions to enter Summary Judgment on behalf of Karnes, Smith and Winston. McLenagan is requesting this Court to review the decision of the Fourth Circuit.

REASONS FOR GRANTING THE PETITION

A. Officer Karnes is not entitled to qualified immunity because at the time he shot McLenagan he did not have an objective legal reason for doing so.

The doctrine of qualified immunity shields government officials who

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4/McLenagan did not appeal the Court's decision to dismiss Tapscott and Shook from the case.

are performing discretionary functions from liability insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1972). With respect to Karnes, McLenagan concedes he was engaged in a discretionary function, but his conduct contravenes clearly established constitutional rights of which Karnes should have been aware. The apprehension of an individual by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment. Tennessee v. Garner, 471 U.S. 1, 7 (1985). Therefore, if a seizure occasioned by the use of deadly force contravenes the Fourth Amendment, the officer making the seizure is not entitled to qualified immunity.

To determine if a seizure that is made by the use of deadly force violates the Fourth Amendment, the Court must determine if the officer had probable cause to believe that the suspect posed a treat of serious physical harm, either to himself or others. Id. at 11. If the officer had such probable cause then the seizure does not violate the Fourth Amendment. Id. However, a police officer may not seize an unarmed, non-dangerous suspect by shooting him. Id. Therefore, if the officer does not have probable cause to believe the suspect posed a threat of serious harm and uses deadly force to seize the suspect, the officer has violated the Fourth Amendment.

The Fourth Circuit recognized that the law of Garner was the clearly established standard concerning the use

of deadly force at the time of the encounter between Karnes and McLenagan. App. at A-7. The ruling of the Fourth Circuit however is not in accord with the holding of Garner and we respectfully submit that the Fourth Circuit incorrectly interpreted this Court's opinion in Garner.

This Court in Garner recognized that the intrusiveness of a seizure by means of deadly force is unmatched and that a suspect's fundamental interest in his own life need not be elaborated upon. Id. at 9. It is clear from this Court's opinion in Garner that society's interest in apprehending criminals is not so vital to justify the use of deadly force upon individuals who do not pose any immediate threat to the officers or others. Id. at 11. Since the sanctity and value of life is great, the use of deadly force is only

constitutionally permissible in two situations: when the suspect threatens the officer with a weapon, or when there is probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm. Id. Unless the officer has that probable cause, it becomes incumbent upon him to determine if the suspect possesses a weapon or something resembling a weapon before firing at him. The ruling of the Fourth Circuit in this case ignores that mandate and permits a police officer to use deadly force on someone without any observation whatsoever of anything resembling a deadly weapon. Such a ruling is contrary to this Court's decision in Garner.

In determining if Karnes was entitled to qualified immunity the Fourth

Circuit also relied upon language from Anderson v. Creighton, 483 U.S. 635 (1987). As a result, the Fourth Circuit incorrectly shifted its focus from the clearly established law of Garner, which addresses the use of deadly force to the law of Creighton, which addresses warrantless search cases. Garner requires a police officer to have probable cause to believe that the suspect he is about to shoot poses a threat of serious physical harm because he possesses a weapon or is believed to have committed a crime involving the infliction or threatened infliction of serious physical harm. Garner at 11. Creighton imposes a lower standard and only questions whether the police officer could have believed his conduct was lawful. Creighton at 641.

The law of Creighton is appropriate in warrantless search cases, but it is not applicable to cases involving the seizure of persons by means of deadly force. The use of deadly force, the taking of human life, is the ultimate seizure. It is a power given to police officers requiring tremendous responsibility and the utmost respect. If successful, the result is irreversible. Therefore, what the police officer could have believed is an inadequate standard by which to measure the use of deadly force. Before the officer can fire his weapon he must have an objective legal reason for doing so. Harlow v. Fitzgerald at 819 (1982). At a minimum, this requires the suspect to threaten the officer with something resembling a weapon or for the officer to have reason to believe the suspect has

committed a crime involving the same. Garner at 11. McLenagan recognizes the practical difficulty of assessing a suspect's dangerousness and is not attempting to second guess split-second decisions by police officers. McLenagan is merely advocating that the minimum standard announced by this Court in Garner, that a police officer must be threatened with something resembling a weapon before using deadly force on someone, be reaffirmed.

Even if this Court determines that the Fourth Circuit was not in error in relying on Creighton in making its determination concerning qualified immunity, the facts of this case are distinguishable and still indicate that Karnes' use of deadly force under the circumstances was inappropriate. At the critical time, Karnes was on his way out

of the building with his back to the area from where Smith and McLenagan were coming. App. at A-36. Smith ran past Karnes in a crouched position with her hands above her head, screaming in a rather hysterical way, "the man got a gun". App. at A-20, A-37-38. Upon hearing this Karnes drew his weapon, turned back toward the detention area from where Smith had come, and saw McLenagan, also in a crouched position, with his hands clasped[5/] at his beltline approximately five to ten feet away. App. at A-38-9, A-41-42, A-52-54. Karnes did not see a gun in McLenagan's hands. (Emphasis added). App. at A-41, A-47. Furthermore, Karnes knew that McLenagan

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5/Clasped is the terminology originally used by Karnes in his brief in support of his Motion for Summary Judgment which McLenagan believes accurately describes what he was demonstrating on pages A-41-42 of the Appendix.

was handcuffed with his hands in front because moments before he had just left him sitting in the detention area. App. at A-44. Karnes was also able to demonstrate and describe the position of McLenagan's hands; clasped at the beltline. App. at A-41-42, A-53. The bullet fired by Karnes first struck McLenagan in the thumb and fingers, and then in the abdomen causing serious and permanent injuries.

The evidence and admissions from Karnes overwhelmingly establish that he had observed that McLenagan did not have a weapon prior to his shooting McLenagan. Therefore, Karnes could not have had probable cause to believe that McLenagan posed a threat to the safety of anyone. Smith's statement establishes that the threat was coming from "a man with a gun". App. at A-20, A-31. Since

Karnes did not observe that McLenagan had a weapon in his hands prior to shooting him, it is clear that the person to whom Smith was referring was not McLenagan. Unfortunately, Smith's panic was contagious and Karnes resorted to the use of deadly force immediately.

Karnes' state of panic and mindset became even more apparent as he approached the closed door to the magistrate's office only six to eight seconds after he realized he had erroneously shot McLenagan. App. at A-43-44. At this time, Karnes fired two additional shots at the closed door without any knowledge whatsoever about who, if anyone, was behind the door. App. at App. 43-44. He did this in an effort to disable or kill the armed individual he assumed was behind the door. Such an action is an grossly

reckless response from an officer who has been fully trained on how to disarm individuals. App. at A-34.

The Fourth Circuit dismissed this episode as irrelevant because it occurred after Karnes shot McLenagan. Petitioner submits that it were not irrelevant because it is so close in time to the shooting of McLenagan, it established that Karnes was in a panic at that time and was not concerned with violating the Fourth Amendment.

Even under the Creighton standard, Karnes could not have believed that McLenagan posed a threat to anyone's safety based on the information he possessed at the time. Karnes' use of deadly force under the circumstances was unreasonable and a contravention of the clearly established law existing at the time, and therefore the Fourth Circuit

erred in cloaking Karnes with qualified immunity.

B. Smith was not engaged in a discretionary function on the night in question and therefore was not entitled to the protection afforded by the doctrine of qualified immunity.

As previously noted, the doctrine of qualified immunity is only available to government officials who are engaged in discretionary functions. Harlow at 818; Creighton at 638. Smith's duty on the night in question was to transport to lockup those individuals who had been arrested for DUI or other offenses. App. at A-13, A-24. Other than being advised of the checkpoint and being asked to provide a vehicle to transport individuals to the lockup, there was no coordination between the Richmond Police and the Sheriff's

Department. App. at A-23-24. There was absolutely no decisions or discretion involved in the function Smith was performing at the sobriety checkpoint. Her job was clearly defined; to transport the people placed in her custody to the City lockup.

Immunity from liability is justified and defined by the functions it protects and serves, not by the person to whom it attaches. Forrester v. White, 484 U.S. 219, 227 (1988). There is no evidence in the record of any decisions made or discretion exercised by Smith concerning her custodial and transportation duties. The mere fact that Loretta Smith is a deputy sheriff does not automatically cloak her with qualified immunity, as she must be engaged in a function requiring the exercise of discretion. Keeping

individuals in her custody and transporting them to the lockup did not require Smith to make any decision or exercise any discretion and therefore she was not performing a discretionary function on the night in question.

The only decision Smith had to make on the night in question was as a result of her own incompetence. She needed to decide what to do when she discovered that one of her prisoners had escaped and was alone in a room with a firearm. Smith's negligent performance of a propriety function cannot transform that proprietary function into a discretionary function for which she can receive the benefits of the doctrine of qualified immunity. Smith's error was made during the performance of a proprietary function and upon realizing her error, she panicked and reacted in

such a hysterical fashion that her error became magnified, ultimately resulting in the injuries sustained by McLenagan. Since Smith was not required to make any decisions or exercise any discretion to perform her custodial and transportation functions on the night in question she was not engaged in a discretionary function. Therefore, she is not entitled to the benefits of the doctrine of qualified immunity and the Fourth Circuit erred in affording her the benefit of the doctrine.

C. McLenagan has stated a claim against Deputy Smith pursuant to 42 U.S.C. §1983 because her actions violated clearly established law which subjected him to a deprivation of his constitutional rights.

McLenagan's claim against Smith stems from Smith's violation of Virginia Code §15.1-138, which requires her to

enforce the criminal law, arrest people who violate the law, and protect the public from violence. Va. Code §15.1-138; See also Commonwealth v. Malbon, 195 Va. 368, 372, 78 S.E.2d 683, 686 (1953) (The creation of a separate and distinct police department within the county, city or town does not relieve the sheriff or his deputies of the duty of enforcing the criminal laws of the state within his jurisdiction) Reynolds v. Commonwealth, 9 Va. App. 430, 436, 388 S.E.2d. 659, 663 (1990) (Police officers owed duties to the public, such as rendering aid to people in danger of physical harm and providing services on an emergency basis). When Smith realized that one of her prisoners had escaped, she ran from the detention area, leaving her other prisoners behind, screaming in a hysterical way, "the man got a gun",

without making an effort to determine if the prisoner did in fact obtain possession of a weapon. App. at A-20-21, A-31. Smith made no effort to protect McLenagan or to enforce the Virginia criminal laws. Sheriff Winston has acknowledged that Smith, being a sworn officer, had a duty to enforce the law when violations occurred in her presence. App. at A-49-50. Contrary to the actions of Smith, Deputy Sheriffs John Pancoast and Jesse Brown both drew their weapons, and Pancoast moved to the hallway door entering the break room, which was just outside the magistrate's office. App. at A-15-16. Smith acknowledged that she never drew her weapon. App. at A-30.

The Federal statute under which McLenagan brings his claim against Smith, 42 U.S.C. §1983, imposes liability on individuals acting under the color of

state law who cause someone to be subjected to a deprivation of their constitutional rights. (Emphasis added). Id. It is clear from the facts that Smith was acting as a deputy sheriff under the color of state law at the time in question and no argument has ever been asserted to the contrary. The deprivation of McLenagan's constitutional rights occurred when Karnes seized him with the use of deadly force. It was Smith's actions which were in violation of clearly established Virginia statutory law which caused McLenagan to be subjected to a deprivation of his constitutional rights at the hands of Karnes.

Karnes' actions subjected McLenagan to a deprivation of his constitutional rights, which is the essence of his §1983 claim against

Karnes. Smith's actions caused McLenagan to be subjected to a deprivation of his constitutional rights. Government officials are shielded from civil liability only when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. (Emphasis added). Harlow v. Fitzgerald, at 818 (1982). Smith violated Virginia Code §15.1-138, as described above, which was clearly established at the time. That violation caused McLenagan to be subjected to a deprivation of his constitutional rights.

In analyzing this portion of McLenagan's claim, the Fourth Circuit relied upon Davis v. Scherer, 468 U.S. 183 (1984), and concluded that a violation of state law is almost always insufficient to sustain §1983 claim.

App. at A-9. The claim presented in the Scherer case is different from that presented by McLenagan, making Scherer inapplicable to this case. Scherer claimed that a violation of a state regulation concerning pre-termination and post-termination employment hearings was also a violation of the due process clause of the Fourteenth Amendment. In this case McLenagan is claiming a violation of the Fourth Amendment occasioned by an improper seizure of his person. It was Smith's violation of clearly established state law which caused McLenagan to be subjected to a deprivation of his constitutional rights. McLenagan does not claim that Smith's violation of the state statute was also a constitutional violation as Scherer did. The crux of McLenagan's §1983 claim against Smith focuses on the language

contained in that statute; causes to be subjected. The language of this statute is designed to make an individual liable for wrongful actions in violation of clearly established state law which do not constitute a constitutional violation, but ultimately result in one. Since McLenagan's claim differs from that advanced by Scherer, the Scherer case is distinguishable from this case.

The Fourth Circuit has also stated that because Karnes' actions did not transgress the Fourth Amendment, Smith cannot be held liable for a violation that does not exist. App. at A-10. As described above, the language of §1983 creates a cause of action against two different classes of defendants: those who actually subject an individual to a constitutional deprivation of rights and those who cause

someone to be subjected to a constitutional deprivation of rights. In this case, Karnes falls in one of those categories and Smith in the other. Thus, Smith is not automatically entitled to the benefit of qualified immunity merely because Karnes is.[6/] Even though Smith's actions are so intertwined with those of Karnes, there is still a separate and distinct claim that can be advanced against each of them pursuant to 42 U.S.C. §1983. Therefore, the Fourth Circuit erred when it ruled that Smith cannot be held liable for a violation if Karnes was not liable.

6/The Fourth Circuit held that Karnes was entitled to qualified immunity, which is not the same as saying Karnes' actions did not transgress the Fourth Amendment. See App. at A-6, A-10.

D. The doctrine of qualified immunity does not afford any protection to an individual who fails to take action when it is required.

The nature of a §1983 claim is to offer a realistic avenue for the vindication of constitutional guarantees when a government official abuses his or her office. Anderson v. Creighton, at 638. The threat of liability under §1983 is also designed to encourage government officials to carry out their duties in a lawful and appropriate manner and to compensate their victims when they do not. Forrester v. White, at 223. One of the policy considerations which pervades the qualified immunity analysis is that the public interest requires decisions and actions to enforce laws for the protection of the public. Scheuer v. Rhoades, 416 U.S. 232, 241 (1974). The concept of immunity recognizes that

government officials may err when they take action to enforce the law, however qualified immunity goes on to assume that it is better to risk some error and possible injury from such error than not to act at all. Id. at 242. Smith did not risk any error because she did not take any action in an effort to enforce the law on the night in question. By fleeing the scene, she violated Virginia state law and subjected her remaining prisoners to immediate danger. Such inaction constitutes a total abandonment of her duties as a deputy sheriff and is not the type of conduct the doctrine of qualified immunity was designed to excuse. Therefore, Smith should not be entitled to the benefits afforded by the doctrine of qualified immunity and the Fourth Circuit erred in granting her the protection of that doctrine.

E. McLenagan's pendent state claims were not patently without merit.

In a §1983 action in Federal Court, where all federal claims are disposed of in the favor of the Defendants, the Federal Court can only dispose of pendent state claims if they are patently without merit. O'Bar v. Pinion, 953 F.2d. 74, 85 (4th Cir. 1991). McLenagan's state law claims against the defendants are not patently without merit. Gross negligence is defined as the absence of slight diligence or the want of even scant care. Frazier v. City of Norfolk, 234 Va. 388, 393, 362 S.E.2d. 688, 691 (1987). Karnes did not exercise any degree of diligence or due care on the night in question, nor does he refer articulate to the Court any he used prior to shooting McLenagan. He merely wheeled around with his gun drawn and saw

McLenagan, who he observed was handcuffed in front, with his hands clasped at his beltline, did not observe a gun in his hands, but nevertheless fired his weapon resulting in severe injuries to McLenagan. App. at A-15-16, A-39, A-41, A-47, A-53.

The use of deadly force by a police officer upon an individual without first observing that the individual is armed with something resembling a weapon exhibits no degree of care whatsoever, amounts to an utter disregard of the safety of others, and constitutes gross negligence. In this case Karnes admits that he did not see a gun in McLenagan's hands prior to shooting him. App. at A-41, A-47. Therefore, Karnes could not have perceived a threat of deadly force from McLenagan and the act of shooting him was without due diligence or even

scant care and constitutes gross negligence. Under these facts, a reasonable jury could conclude that Karnes' actions amounted to the absence of even slight diligence or the want of scant care and constituted gross negligence. Therefore, McLenagan's gross negligence claim against Karnes is not patently without merit and it was improper for the Fourth Circuit to dispose of this claim.

The doctrine of sovereign immunity in Virginia only affords a government agent protection from acts of simple negligence while they are performing discretionary functions, it does not afford protection to government agents whose acts constitute gross negligence. Colby v. Boyden, 241 Va. 125, 128, 400 S.E.2d. 184, 187 (1991). Whether a particular act is entitled to

the protection of sovereign immunity depends upon whether it is discretionary or ministerial in nature. Id. at 128-129, 400 S.E.2d. at 186-7. As described above, Smith was not engaged in a discretionary function on the night in question because her duties did not require her to make decisions or exercise discretion. Therefore, Smith is not entitled to the protection of sovereign immunity.

Even if this Court concludes that Smith's actions were discretionary in nature, she is still not entitled to sovereign immunity because her actions on the night in question constituted gross negligence. Id. at 128, 400 S.E.2d. at 186. Not only were Smith's actions in wanton and reckless disregard for the rights of others, they did not amount to an exercise of slight diligence or scant

care. She allowed a prisoner in her presence to escape into a room where a gun was left lying openly on a table. She did absolutely nothing to prevent the individual from escaping and upon learning of the escape she ran from the room hysterically screaming "the man got a gun" without making any effort to determine if he in fact had a gun.

The Fourth Circuit concluded that McLenagan's claim of gross negligence against Smith was patently without merit because Smith's actions in alerting the other police officers, by screaming, "the man got a gun" was consistent with her training and therefore established at least slight diligence or scant care. App. at A-11. Both Smith and Winston have acknowledged that deputy sheriffs have been trained that when confronted by a sudden threat

from an armed individual with a firearm a deputy sheriff should take cover or escape. App. at A-21, A-25. Winston has also acknowledged that when a deputy sheriff encounters an armed individual under circumstances that indicate a serious threat to bystanders, whether civilians or law enforcement officers, the deputy is trained to alert the people present so that they become aware of the threat, and that Smith's conduct was in keeping with the sheriff's office training. App. at A-26. The actions of Smith on the night in question were not consistent with her training because she was never confronted with an armed individual. She merely assumed that the arrestee in the other room had gained possession of a weapon. App. at A-30. Furthermore, the manner in which she alerted the other officers by running

from the room screaming hysterically only exacerbated the situation and placed her other prisoners in immediate danger.

Based on these facts, a reasonable jury could conclude that Smith did not exercise slight diligence or scant care and that her actions constituted gross negligence. Therefore, McLenagan's gross negligence claim against her is not patently without merit and it was improper for the Fourth Circuit to dispose of that claim.

The Fourth Circuit also disposed of McLenagan's claim against Winston because they concluded that Smith's actions at the scene did not constitute gross negligence. Even if Smith's actions did not constitute gross negligence because she acted in accordance with her training, a reasonable jury can still conclude that

Sheriff Winston was grossly negligent in training Smith to react in such a fashion. The claim against Winston focuses on Smith's training, not her actions on the night in question. Therefore, if Smith received grossly inadequate training, Winston could be found to be guilty of gross negligence. As Judge Williams of the District Court so eloquently put it, "anybody can run and hide and go for cover". App. at A-55.

Finally, the Fourth Circuit concluded that McLenagan's assault and battery claim against Karnes was patently without merit because Karnes' actions under the circumstances were justified, and therefore McLenagan could not prove a wrongful act which is a necessary element of his claim. App. at A-11. Whether or not Karnes' actions under the

circumstances were justified depends on whether or not his actions were also reasonable. Reasonable minds can differ on this question in this case. Therefore, this is an issue of fact to be decided by a jury and it was improper for the Fourth Circuit to dispose of this claim as a matter of law.

CONCLUSION

The decision of the Fourth Circuit Court of Appeals concerning McLenagan's §1983 claim against Karnes is contrary to the principles and policy considerations of this Court's ruling in Tennessee v. Garner, 471 U.S. 1 (1985). The Fourth Circuit's ruling concerning McLenagan's §1983 claim against Smith is contrary to the very language of §1983 and was given little if any analysis by that court. If these ruling are allowed

to stand, it will prohibit the redress of a constitutional deprivation of rights which resulted in serious and permanent injuries to a citizen of the United States. It will also send a message to law enforcement officers that the use of deadly force can be justified even though the officer is not threatened with a weapon or an item he believes to be a weapon, and if the situation is too dangerous it is permissible to run away from it.

Therefore, and for all the foregoing reasons, the Petitioner respectfully requests that this Court issue a writ of certiorari to the United States Fourth Circuit Court of Appeals.

Respectfully submitted,

WILLIAM R. MCLENAGAN

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APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

WILLIAM R. McLENAGAN,
Plaintiff-Appellee,

v.

JOHN C. KARNES, Richmond Police Officer,
Defendant-Appellant,

and

MARTY M. TAPSCOTT, Chief of Police, City of Richmond; THOMAS E. SHOOK, Captain, Police Department, City of Richmond; ANDREW J. WINSTON, Sheriff of the City of Richmond; LORETTA SMITH, Richmond Deputy Sheriff,
Defendants.

No. 93-1992

WILLIAM R. McLENAGAN,
Plaintiff-Appellee,

v.

ANDREW J. WINSTON, Sheriff of the City of Richmond; LORETTA SMITH, Richmond Deputy Sheriff,
Defendants-Appellants,

and

No. 93-1993

MARTY M. TAPSCOTT, Chief of Police, City of Richmond; THOMAS E. SHOOK, Captain, Police Department, City of Richmond; JOHN C. KARNES, Richmond Police Officer,

Defendants.

Appeals from the United States District Court
for the Eastern District of Virginia, at Richmond.
Richard L. Williams, Senior District Judge.
(CA-93-247)

Argued: April 13, 1994

Decided: June 30, 1994

Before HALL and WILLIAMS, Circuit Judges, and GODBOLD, Senior Circuit Judge of the United States Court of Appeals for the Eleventh Circuit, sitting by designation.

Reversed and remanded by published opinion. Judge Hall wrote the opinion, in which Judge Williams and Senior Judge Godbold joined.

COUNSEL

ARGUED: Glen Franklin Koontz, OFFICE OF THE CITY ATTORNEY, Richmond, Virginia, for Appellant Karnes; Robert A. Dybing, SHUFORD, RUBIN & GIBNEY, Richmond, Virginia, for Appellants Winston and Smith. Murray Joseph Janus, BREMNER, BABER & JANUS, Richmond, Virginia, for Appellee. **ON BRIEF:** William Joe Hoppe, OFFICE OF THE CITY ATTORNEY, Richmond, Virginia, for Appellant Karnes; John A. Gibney, Jr., SHUFORD, RUBIN & GIBNEY, Richmond, Virginia, for Appellants Winston and Smith.

Scott W. Lechner, BREMNER, BABER & JANUS, Richmond, Virginia, for Appellee.

OPINION

HALL, Circuit Judge:

In the early morning hours of May 10, 1992, the Richmond Police Department was conducting a sobriety checkpoint at a toll plaza on the Richmond Downtown Expressway. Drivers who failed a field sobriety test were taken into an office building adjoining the plaza and tested with a breathalyzer. Those who again failed were presented to a magistrate at the scene, who issued an arrest summons.

The magistrate performed her evening's duties out of an office that she had borrowed for the occasion. She carried a holstered revolver[1] and had placed it upon a coffee can atop her desk; the weapon was visible to all who entered the office. After the magistrate had served an individual with an arrest summons, the detainee (now arrestee) was escorted from the office and seated in a large adjoining room, ordinarily a break room for plaza employees. The arrestees remained in the break room until transported via bus to the city jail.

Richmond Sheriff's Department deputies assumed custody of the arrestees.[2] The deputies handcuffed the arrestees, maintained order in the break room, and drove the jail bus. All of the arrestees were handcuffed with their hands in front of their bodies[3] and remained that way until after they arrived at jail.

[1]Virginia magistrates, as "conservators of the peace," *see* Va. Code Ann. § 19.2-45(7) (Michie 1990), are authorized to carry firearms or other weapons while in the discharge of their official duties. *See* Va. Code Ann. § 18.2-308(C)(4) (Michie Supp. 1993) (exempting conservators of the peace from that section's prohibition against carrying concealed weapons).

[2]Though the deputies are authorized to carry guns, they generally do not perform many of the duties one would traditionally associate with the title of their office. The deputies are primarily responsible for corrections, civil process, and court security.

[3]This method of securing the arrestees' hands was consistent with the deputies' training. The deputies are instructed to handcuff arrestees with

At about 3:00 a.m., as the police were preparing to close the checkpoint, Deputy Loretta Smith and two arrestees were seated in the break room. The magistrate exited her office and crossed the break room on her way to the main hallway and the women's restroom beyond; she was not carrying her revolver.[4] Moments later, one of the arrestees, still handcuffed in front, jumped from his seat and dashed past Deputy Smith into the magistrate's office. Smith did not instantly react; however, she soon realized that the magistrate had left the revolver behind.

Smith ran from the break room and turned down the main hallway toward the front door of the building, waving her arms in the air and yelling, "The man has got a gun!" several times on her way out. William McLenagan, the other arrestee who had been seated in the break room, was close behind her, hands still cuffed in front, also trying to flee the perceived danger. McLenagan was running in a crouched position because the handcuffs constricted the normal motion of his arms.

Smith, still yelling, "The man has got a gun!," ran past Richmond police officer John Karnes, who was escorting a detainee down the main hallway toward the front door, away from the break room. Karnes immediately drew his gun, wheeled and saw McLenagan almost upon him; Karnes could not see whether McLenagan had a gun in his hands.[5] Karnes shot McLenagan. Karnes nearly shot

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their hands behind their backs only when they are known to be violent, exhibit threatening behavior, or are detained in the course of a street arrest by the deputy.

[4]During the course of the evening, Deputy Smith had been in the magistrate's office and had seen the revolver.

[5]The only fact that appears to be disputed is the distance between Karnes and McLenagan at the critical moment. Karnes testified that, when he turned, McLenagan was two or three feet away; McLenagan estimates the distance at five to ten feet. As the non-moving party, McLenagan is entitled to have the facts viewed in the light most favorable to him. *Mitchell v. Rice*, 954 F.2d 187, 190 (4th Cir.), *cert. denied*, 113 S. Ct. 299 (1992). We accept McLenagan's estimate of the distance, but do not consider the slight discrepancy to be material. The important fact, undisputed in the record, is that Karnes could not see whether McLenagan possessed a gun.

McLenagan a second time, but observed, as McLenagan fell, that he had no weapon. Karnes swore, ran toward the magistrate's office and, about six to eight seconds following the initial shot, fired two more bullets through the now-closed office door. Karnes's superiors quickly arrived on the scene and ordered him to leave the building. The arrestee who had dashed into the magistrate's office was eventually subdued.

McLenagan suffered serious injuries to his hands and abdomen. On April 7, 1993, he filed suit in district court against Karnes, Smith, Capt. Thomas Shook (Karnes's supervisor), Sheriff Andrew Winston, and Police Chief Marty Tapscott. McLenagan alleged that the five, either by their actions at the scene or by failing to properly train and supervise their subordinates, had violated his federal civil rights "secured by the [Four]th, [Fif]th, and [Fourteen]th Amendments." McLenagan also brought supplemental (pendent) state claims for gross negligence against all five, and for assault and battery against Karnes. The complaint purported to sue Tapscott and Winston in their official capacities only, and Karnes, Smith, and Shook in both their official and individual capacities.

The "police defendants" (Karnes, Tapscott, and Shook) and the "sheriff defendants" (Smith and Winston) filed separate answers, asserting, among other defenses, qualified immunity as to the federal claims and sovereign immunity as to the state claims. The sheriff defendants filed a motion to dismiss, pursuant to Fed. R. Civ. P. 12(b)(6), and all the defendants filed motions for summary judgment.

The district court ruled on the sheriff's motion to dismiss on June 16, 1993. The court dismissed only that portion of McLenagan's § 1983 claim that pertained to Smith and Winston in their official capacities; the individual-capacity § 1983 claims and the state law gross negligence claims survived the motion.

The court then, on July 23, 1993, conducted a joint hearing on the motions for summary judgment, after which it granted full summary judgment to Tapscott and Shook but denied immunity to the other defendants on both the federal and state claims. Remaining are the claims against Karnes and Smith (in her individual capacity only) under § 1983, the gross negligence claims against Karnes, Smith, and

Winston (in his official capacity only), and the assault and battery claim against Karnes.

Karnes, Smith, and Winston all appeal.[6] We hold that Karnes and Smith are entitled to qualified immunity on the § 1983 claim, and that all three are entitled to sovereign immunity on the supplemental claims. Accordingly, we reverse the judgment of the district court and remand for it to enter summary judgment for the appellants on all of McLenagan's claims against them.

I.

Government officials who perform discretionary functions[7] are not liable under § 1983 for civil damages to the extent that their conduct does not contravene "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The first step in assessing the potential civil liability of state actors under § 1983 is to determine whether the plaintiff has properly asserted a violation of a clearly established right arising under either the Constitution or a federal statute. *American Civil Liberties Union, Inc. v. Wicomico County*, 999 F.2d 780, 784 (4th Cir. 1993) (citing *Siegert v. Gilley*, 111 S. Ct. 1789, 1793 (1991)).

A.

McLenagan asserts that Karnes's use of his service revolver constituted excessive force, and was thus an unreasonable seizure within the meaning of the Fourth Amendment, as applicable to Karnes via the

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[6] *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (authorizing interlocutory appeals where the district court denies a claim of qualified immunity at the summary judgment stage).

[7] Karnes and Smith, as law enforcement officers in the field who are often forced to devise unique responses to the myriad demands of their environment, are government officials who perform discretionary functions. The facts of this very case illustrate the discretionary nature of the tasks that Karnes and Smith were performing; indeed, the gravamen of McLenagan's complaint is that each, when faced with a critical decision, decided wrongly.

Fourteenth Amendment. The clearly established standard at the time of the encounter between Karnes and McLenagan was that a police officer's use of deadly force is not excessive where he has probable cause to believe that a suspect poses a threat of serious physical harm to the officer or others. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). To ascertain whether probable cause existed for Karnes to fire his weapon, we consider "the particular circumstances confronting the official at the time of the questioned action." *Slattery v. Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991) (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Regardless of whether probable cause actually existed, if a reasonable officer possessing the same particularized information as Karnes *could* have, in light of *Garner*, believed that his conduct was lawful, then Karnes is entitled to qualified immunity. *Anderson*, 483 U.S. at 641.

Slattery v. Rizzo, *supra*, is our leading case addressing the issue of qualified immunity in the excessive force context. Slattery was a passenger in a car parked in a lot while the driver stood nearby, making a drug deal with an undercover officer. When the police swarmed in for the arrest, Officer Rizzo approached the car from the side and could see that Slattery was holding an object in his left hand. Rizzo repeatedly commanded Slattery to raise his hands; Slattery failed to comply, instead turning his head to look at Rizzo and then returning his glance forward. When Slattery started to move his entire upper body toward the officer, Rizzo shot Slattery in the face. The object in Slattery's hand turned out to be a beer bottle.

Slattery sued, and the district court denied Rizzo qualified immunity. We reversed, holding that a reasonable officer in Rizzo's position could have had probable cause to believe that Slattery posed a deadly threat.

McLenagan argues that *Slattery* is distinguishable on three bases. First, because the incident at issue in *Slattery* did not occur in a toll plaza, but in a high-crime area known for its drugs and guns, it would be far more likely in the latter situation that an officer's potential target would be armed. Second, Officer Rizzo repeatedly commanded Slattery to raise his hands; Officer Karnes issued no such warnings. Third, while Rizzo noticed that Slattery was apparently holding some-

thing in his left hand, Karnes never actually saw anything in McLenagan's hands.

These distinctions prove no more than that every case has its own facts. Initially, we note that an area's general characteristics, while perhaps relevant in determining the existence of probable cause, become much less so in the face of a credible warning — issued in this case by Deputy Smith — that an imminent danger exists. While, under ordinary circumstances, Karnes may have had considerably less reason than Rizzo to believe that a person selected at random from the area was armed, he had, if anything, *more* reason than Rizzo to believe that a gun was present at the immediate time and place, because he could have reasonably believed that someone had actually seen it.

Regarding McLenagan's second purported distinction, we agree that a suspect's failure to raise his hands in compliance with a police officer's command to do so may support the existence of probable cause to believe that the suspect is armed. This point is implicit in *Slattery*. In that case, however, Officer Rizzo, having initiated the encounter, had sufficient time to give repeated warnings; here, Officer Karnes had no such luxury. When he turned and drew his weapon, McLenagan, in full flight, was virtually upon him. For all Karnes knew, the hesitation involved in giving a warning could readily cause such a warning to be his last. We decline, therefore, to fashion an inflexible rule that, in order to avoid civil liability, an officer must always warn his suspect before firing — particularly where, as here, such a warning might easily have cost the officer his life.

Similarly, we do not think it wise to require a police officer, in all instances, to actually detect the presence of an object in a suspect's hands before firing on him. Karnes had been in the break room and was aware that the arrestees gathered there were handcuffed. But he also knew that they were handcuffed in front, making it possible for them to fire a gun. It is true that Karnes did not see a gun in McLenagan's hands, but it is also true that he could not confirm that McLenagan was unarmed. We will not second-guess the split-second judgment of a trained police officer merely because that judgment turns out to be mistaken, particularly where inaction could have resulted in death or serious injury to the officer and others. Although

it is extremely unfortunate that McLenagan was seriously injured, § 1983 does not purport to redress injuries resulting from reasonable mistakes.

We are nonetheless troubled by Officer Karnes's actions following the critical moment. After shooting McLenagan, Karnes quickly proceeded to the magistrate's office, and, without apparent regard for who might be behind the closed door, twice fired through it. In a considerably closer case, involving a decision taking longer than a fraction of a second, such conduct might be indicative of an officer's propensity for ill-considered actions, and thus possibly relevant to the probable cause determination. However, in *this* case, Karnes had no time to consider anything at all — except his and the public's immediate safety. At the moment of truth, Karnes acted well within the range of behavior expected of a police officer. What happened after the critical time had passed is simply irrelevant.

B.

Though McLenagan's § 1983 claim against Officer Karnes is easily identified as one of excessive force in violation of the Fourth Amendment, his claim against Deputy Smith defies facile classification. While McLenagan has argued that Smith had a duty under Virginia law to protect him from violence,[8] an asserted violation of state law is almost always insufficient to sustain a federal claim under § 1983.[9]

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[8]Va. Code Ann. § 15.1-138 (Michie Supp. 1993) provides that "officers . . . constituting the police force of counties . . . of the Commonwealth . . . shall secure the inhabitants thereof from violence and the property therein from injury."

[9]*See Davis v. Scherer*, 468 U.S. 183, 193 (1984). State law, however, may bear upon a claim under the Due Process Clause where *property* interests protected by the Fourteenth Amendment are created by state law. *Id.* at n.11 (citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). Section 15.1-138 possibly creates a cognizable property interest on McLenagan's behalf (the continued fruits of his labor) that Deputy Smith may have had an obligation to protect, but McLenagan can demonstrate no clearly established standard whereby Smith's actions can be evaluated for a potential violation of substantive due process. It is quite possible that, by virtue of alerting the officers near the scene of the situa-

McLenagan has also argued that Smith's actions are so intertwined with those of Karnes as to constitute a single "cause" of McLenagan's injuries, and therefore Smith should, in effect, be held jointly liable with Karnes for Karnes's alleged constitutional violation. The short answer to this argument is that, because we have held Karnes's actions did not transgress the Fourth Amendment, Smith cannot be held liable for a violation that does not exist. Moreover, even had we upheld the district court's judgment with regard to Karnes, it would be inequitable to deny Smith the protection of qualified immunity on the basis of an eventuality that she could not reasonably have foreseen.

II.

We turn now to McLenagan's state law claims against Karnes, Smith, and Winston for gross negligence, and against Karnes for assault and battery.[10] As a threshold matter, we must decide whether

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tion, Smith's actions could have provided *more* protection for McLenagan's "property" than had she stayed behind to confront the arrestee in the magistrate's office.

As a general matter, there is no direct federal "right to protection." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 197 (1989). An exception may apply where the State creates or assumes a "special relationship" with a person, as when it takes him into its custody and holds him there against his will, such as it does with an incarcerated prisoner or an involuntarily committed mental patient. *Id.* at 198-201. However, even if McLenagan's case fits within the exception, he still cannot demonstrate the existence of a clearly established standard purporting to govern Smith's actions.

[10]The appellants are not entitled to the defense of sovereign immunity if they are deemed to have acted in a grossly negligent fashion. *Colby v. Boyden*, 400 S.E.2d 184, 187 (Va. 1991). Similarly, Karnes obviously could not avail himself of the defense had he intended to commit an assault and battery against McLenagan. Simply put, under Virginia law, sovereign immunity is not available to a defendant whose culpability extends beyond mere negligence.

Sovereign immunity, like qualified immunity, is only available to public officials performing discretionary functions. *Id.* at 186. We believe that, under Virginia's four-factor test, *see id.* at 186-87, the appellants were engaged in discretionary functions at the moment McLenagan was shot. *See* note 7, *supra.*

to exercise our discretion to address these claims. In a § 1983 action in federal court, where all federal claims are disposed of in favor of the defendants, leaving only state claims that have been briefed by both parties and are "patently without merit," the balance between judicial efficiency and comity is struck in favor of the federal court's disposition of the state claims. *O'Bar v. Pinion*, 953 F.2d 74, 85 (4th Cir. 1991).

An analysis of Virginia law reveals that McLenagan's state claims are patently without merit. Gross negligence is defined as the "absence of slight diligence, or the want of even scant care." *Frazier v. City of Norfolk*, 362 S.E.2d 688, 691 (Va. 1987). It is that degree of negligence that "shows an utter disregard of prudence amounting to complete neglect of the safety of another." *Id.* Karnes's conduct did not amount to complete neglect of McLenagan's safety; he was simply faced with an impossible choice that had to be made in the flickering of an instant. Had Karnes chosen not to shoot and McLenagan indeed been armed, resulting in injury to another, we do not doubt that we would today be deciding whether Karnes's decision in *that* case constituted "complete neglect of the safety of another."

McLenagan's claims of gross negligence against Smith and Winston are also patently without merit. Deputy Smith's attempts, consistent with her training, to alert other police officers to the situation in the magistrate's office conclusively establish at least slight diligence or scant care with regard to McLenagan's safety. It logically follows that if Smith's actions at the scene did not constitute gross negligence, then Sheriff Winston was likewise not grossly negligent in training Smith to react in such a fashion.

Finally, with regard to the assault and battery claim against Karnes, McLenagan is required to prove both a "wrongful act" and resultant physical injury. *Pike v. Eubank*, 90 S.E.2d 821, 827 (Va. 1956). A wrongful act imports lack of justification or excuse. *Id.* We hold that Karnes's actions under the circumstances were justified and that no reasonable minds could differ on the question. Thus, this claim is also patently without merit.

Because the appellants' actions in this matter did not rise to a level of culpability that would deprive them of the protection of qualified

and sovereign immunity, the judgment of the district court is reversed, and the case remanded for it to enter summary judgment on behalf of the appellants.

REVERSED AND REMANDED

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

WILLIAM R. MCLENAGAN, Plaintiff,

v. Civil Action No.: 3:93CV247

MARTY M. TAPSCOTT, et al., Defendants.

AFFIDAVIT

The Affiant, Deputy Sheriff John Pancoast, says the following:

1. I am a deputy sheriff for the City of Richmond, and I have served as such for six and a half years. On the night of May 9-10, 1992 I was assigned to work at a sobriety checkpoint at the Lombardy toll plaza on the Richmond-Downtown Expressway. My job was to transport detainees to the city lockup. This assignment was to last until 0300 hours on the morning of May 10, 1992.

2. At approximately 0300 Magistrate Klaschka said that anyone needing a blood test would have to go downtown because this operation was closing down. When she said this, she was standing in the doorway labeled number 1 on the attached diagram, which I drew on May 11, 1992. At this time Deputy Sheriff Jesse Brown and I were in the bathroom labeled number 2 on the diagram with a detainee named McMillan, and another detainee whose name I do not know. Magistrate Klaschka moved into the hallway labeled number 3 on the diagram, where she smoked a cigarette.

3. The following detainees were in the break area labeled number 4 on the diagram, seated in chairs: William McLenagan, who was seated in area number 4; Robert Llcyd seated in area number 4; and Lamont Kerr, seated in area

number 4. McLenagan, Lloyd and Kerr were in the custody of the Sheriff's Department and all were handcuffed. Robert McGee, who was in police custody awaiting transport to MCV for blood testing, was standing at the counter labeled number 5. I know McLenagan had been served with an arrest warrant because after the incident I saw the warrant.

4. While Deputy Brown and I were in the bathroom I saw Deputy Smith run from the break room, yelling "he has a gun, he has a gun!" I was told that William McLenagan ran out of the break room behind Deputy Smith, but I did not see him. Deputy Brown and I both drew our weapons. I next saw two police officers, who I believe to be J. C. Karnes and J. F. Hannah, with their weapons drawn. I heard three or four

shots fired and saw shells flying through the air.

5. I moved to the hallway door entering the break room. I saw the door to the magistrate's office was closed, and was told that a detainee was behind the door armed with a weapon. As more police officers arrived I left to check on Deputy Smith and was told that William McLenagan had been shot. He was being cared for by police officers and at their request I removed our handcuffs from him. I again entered the building and saw detainee Lamont Kerr being led from the building by police.

6. At approximately 0320 hours I saw Magistrate Klaschka standing outside the front of the building. She said "he got my gun, didn't he?"

7. I know personally that no detainees were left unattended by law

enforcement officers while in our custody. All detainees remained seated during the time they were in custody except when they were lighting a cigarette or using the restrooms.

I swear under penalty of perjury that the foregoing statements are true.

/s/
Deputy Sheriff John Pancoast

Date: 06-02-93

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

WILLIAM R. MCLENAGAN, Plaintiff,

v. Civil Action No.: 3:93CV247

MARTY M. TAPSCOTT, et al., Defendants.

AFFIDAVIT

The Affiant, Deputy Sheriff Loretta Smith, says the following:

1. I am a deputy sheriff of the City of Richmond, Virginia, and have served as such since 1985. I am assigned to the transportation department and was working in that capacity on the night of May 9-10, 1992. I was assigned to Richmond City Police sobriety checkpoint on that night, responsible for transporting to the lock-up detainees charged with driving under the influence and similar offenses.

2. At about 0310 hours, I was seated in a room in an office building located near the toll booths on the Richmond Downtown Expressway. The room was known as the break or snack room, and it contained enough seats, four or five, that detainees could sit down there pending transport to the lock-up.

3. Three detainees were in the room at 0310 hours, along with a police officer whose name I do not know, and me. All detainees were handcuffed.

4. In an adjacent room, Magistrate Klaschka had set up an office where for some number of hours she had been processing the necessary paperwork for the individuals arrested at the checkpoint. In that office I saw a gun in a holster resting on top of a coffee can which was on a table, in full view of anyone in the room. It was my

understanding that the gun belonged to the magistrate.

5. The magistrate left her office and said to the law enforcement officers present: "If there is any more blood work to be done, take the prisoners to MCV and then to the lock-up for paperwork to be done." She walked from her office to the break room and smoked a cigarette in the hallway.

6. A detainee jumped up, dashed into the magistrate's office, and I heard the sound of a chair sliding on the floor. I recalled the weapon on top of the coffee can, and I recognized that the magistrate had forgotten to take the gun with her when she walked out of her office.

7. I immediately yelled "the man got a gun!" as loud as I could so that everyone in and around the room

would know there was an emergency situation. Because the two other detainees had seen the man rush into the magistrate's office, and also heard me yell, I knew that they were aware of what was happening. I then ran out of the room as fast as I could yelling to alert the other law enforcement officers in the building that we had an emergency.

8. I have been trained that when facing a sudden threat from an individual armed with a firearm a deputy sheriff should take one of the following actions, in his or her best interest: (i) take cover, or (ii) escape. I chose to escape.

9. After I ran out of the snack room I heard two shots fired.

I swear under penalty of perjury that the foregoing statements are true.

/s/
Deputy Sheriff Loretta Smith

Date: 05-26-93

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

WILLIAM R. MCLENAGAN, Plaintiff,

v. Civil Action No.: 3:93CV247

MARTY M. TAPSCOTT, et al., Defendants.

AFFIDAVIT

The Affiant, Sheriff Andrew Winston, says the following:

1. I am the Sheriff for the City of Richmond, and was serving in that capacity at the time of this incident on May 9-10, 1992.

2. Sheriff's Office records reflect that the only coordination of the activities of the police and the Sheriff's Office at the sobriety checkpoint set up at the RMA Expressway on May 9-10, 1992 occurred in a meeting held several days before. Coordination

consisted of the Richmond Bureau of Police making the Sheriff's Office aware that a checkpoint was being set up, and requesting that we assign deputy sheriffs and/or a wagon for the purpose of transporting prisoners to the lock-up.

3. The deputy sheriffs present at the checkpoint were responsible solely for transporting detainees to the lock-up.

4. Deputy Sheriffs are not trained to be law enforcement officers. The Sheriff's Office is responsible for corrections, civil process, and court security.

5. Deputy sheriffs receive regular training in the proper performance of their duties, including the proper use of firearms, and instruction in the laws that pertain to arrest and detention. Sheriff's Office

records show that Deputy Loretta Smith received such training, and successfully passed the examination of laws of arrest, including use of force, search and seizure on March 2, 1992, fewer than two months prior to this incident.

6. Deputy sheriffs are trained to handcuff detainees with their hands in front of them, unless such detainees are known to be violent, exhibit threatening behavior, or are detained in the courses of street arrest by the deputy.

7. Deputy sheriffs are not trained to disarm armed individuals. In cases where a deputy sheriff is confronted by a sudden threat by an armed individual, he should either take cover, or escape, based on the deputy's determination of what action is appropriate.

8. When deputy sheriffs are working on the same location as Richmond Police, deputy sheriffs are trained to recognize that the police have responsibility for responding to emergency situations calling for law enforcement.

9. When a deputy sheriff encounters and armed individual under circumstances that indicate a serious threat to bystanders, whether civilians or law enforcement officers, the deputy is trained to alert the people present so that they become aware of the threat. Deputy Smith's conduct in yelling "he's got a gun!" was in keeping with Sheriff's Office training.

10. The Department of Criminal Justice Services of the Commonwealth of Virginia has certified the training academy of the Richmond Sheriff's Office.

This department is responsible for the establishment of training standards for law enforcement agencies throughout the Commonwealth. Deputy Smith, like all deputy sheriffs, received her training at the training academy of the Richmond City Sheriff's Office.

I swear under penalty of perjury that the foregoing statements are true.

/s/
Sheriff Andrew Winston

Date: 05-27-93

EXCERPTS FROM LORETTA SMITH DEPOSITION - DIRECT

Q. You are seated, you are the only deputy in the room, two deputies in the men's room with the detainee, one is in the van?

A. Correct.

Q. What happened next?

A. Mr. Kier jumped up and dashed into her office.

Q. When he jumped up, what did you do?

A. I jumped, you know, more like I flinched.

Q. Well--

A. Then I thought to myself, well, there is no way he can get out of there. Then the next thing that popped out of my head was the gun that had been lying on the coffee can.

Q. When he went in there did he shut the door?

A. I don't recall that.

Q. When he jumped up the door would have been to your left in front of you, to your left; is that right?

A. When he jumped up?

Q. Yes ma'am. The door to the magistrate's office would have been in front of you to your left.

A. No.

Q. It would have been to your right?

A. No.

Q. Where would it have been?

A. More like behind me to my left.

Q. If you were facing him, how did he get by you?

A. He ran.

- - - - - - - - - - - - - - - - - - - -

Q. Did you ever hear the person say anything when he got in the room?

A. No.

Q. So you just assumed he was going to pick up the gun?

A. Well I knew he had no way out of there, so I assumed he was going after the gun; correct.

Q. Did you say anything to him?

A. No.

Q. You didn't say "freeze", "stop", "don't move"; nothing of that nature?

A. No.

Q. Did you draw your weapon?

A. No.

- -

Q. As you ran in that direction you would have had your back to the door?

A. Correct.

Q. Did you look over your shoulder to see if the person in fact had picked up the gun?

A. No.

Q. Did you yell anything to the person in the room?

A. No.

Q. You just ran?

A. No.

Q. What did you do other than run?

A. Yelled.

Q. What did you yell?

A. "The man has got a gun. The man has got a gun."

Q. Where were you when you yelled that? Headed towards the hallways?

A. Yeah.

EXCERPTS FROM OFFICER KARNES DEPOSITION - DIRECT

Q. When you left Bobby Dillard at the University of Richmond, had you attained any rank? Or was it too early to get any?

A. I didn't try to achieve any; I still haven't.

Q. When you came with the Richmond Police Department, what training did you receive, Mr. Karnes?

A. Well, the Richmond Police have a rule that you have to go through another Academy irregardless of where you came from, so I went through another Academy.

Q. You say "another Academy" you mean their own?

A. Their own Academy.

Q. Even though you had training, you have to start from scratch with everybody else?

A. I think they want to know everything is covered. I went and graduated first in the class. The first Academy I graduated 99.61, so I have always scored at the top of the class.

Q. Where was the six months class in Richmond? Was that still the basement of the Mosque.

A. Yes, sir.

- -

Q. How long were you in uniform patrol?

A. With the Richmond Police?

Q. Yes, sir.

A. About three years.

Q. Did you have any defensive training?

A. Hand-to-hand?

Q. Hand-to-hand, yes, sir.

A. Yes, sir.

Q. And what method would you use? Just various police techniques?

A. Most of our methods are of the Kogar method, Kogar twist.

Q. K-O-G-A-R?

A. I am not too sure on the spelling, but you use control methods that allow you to control a party, and it is painless as long as they don't resist. The more they resist the more pressure it applied to the various joints you are working.

Q. Are you taught how to disarm a person?

A. Yes.

- -

Q. Then where were the detainees seated? There appear to be three squares

which look like they may be chairs right above the word "detention".

A. Yes, sir. I think it was more chairs than that there. It seems like to me it was like six chairs over there in a line.

Q. And all the detainees you saw in the room, who had been turned over to the deputy, were handcuffed in front of them; is that right?

A. Yes, sir.

Q. Were there deputy sheriffs in there guarding them? I mean you have told us they were talking and smoking, it was fairly relaxed?

A. Well, when I was in that area filling out the CCRE--

Q. That was the counter where the microwave was?

A. Right, with Mr. McGhee, right. There was a chair right here, and I was trying to stand right here, fill it out, and Loretta Smith was sitting in this chair (indicating).

Q. She would have been facing, sort of, the three chairs where the detainees were?

A. Sort of.

- -

Q. So as Deputy Smith ran out she would have been coming from the rear; is that right?

A. Right. She would have been coming from here, I imagine.

Q. Okay.

A. Around here, the same direction I was going.

Q. She passed you on your left?

A. When I first heard her she was behind me. By the time she said it the second time or the third time, she was right here, because I picked her up out of my peripheral view.

Q. Your prisoner was still on your right?

A. Still on my right.

Q. Did you have any contact with her? Did she brush up against you?

A. I don't think I did.

Q. Did you ever see her? Or did you just hear her?

A. I saw her from the side, just a silhouette type thing, you know. I didn't stare at her or anything like that. I could see her hands were up and she was running? And she was scared and hollering.

Q. Hollering in a rather hysterical way?

A. Yes, she appeared to be scared.

- -

Q. Did you have any conversation with Loretta Smith, other than how is it going, or something like that?

A. No.

Q. Did you ever see her with her weapon drawn, Officer Karnes?

A. I didn't know she had one.

Q. You never saw Kier with the gun before you left the room, of course?

A. No.

Q. What happened as she came by? In your peripheral vision to your left, what did you detect? You said you don't recall it, but you instinctively -

A. I don't recall it, but I did unholster my weapon and turn around.

Q. What would have happened if nothing had happened?

A. If nothing had happened I would have left.

Q. McGhee was still standing next to you?

A. Right.

Q. Then what happened next?

A. After I unholstered the weapon, and turning around immediately, it turned out to be your client, came out of this room. He was running very fast. He made the turn like right in front of me. It's a dimly lit hallway. His hands were in front of him, and he was stooped low, like he would be carrying a gun. I fired at him one time. I jerked out of his way, and broke my watch crystal. I got ready to shoot him again, but when he got

shot the first time he raised up like this and then --

Q. Raising up--

A. I won't say what I said, but it was obvious--

Q. He threw his head back?

A. He raised up direct, straight, put his hands here (indicating). I still couldn't believe. I was still watching, and all this was like in slow motion at this time, and he starts to fall.

Q. Fall backwards?

A. He kind of went forward and went to the side, and fell on his back still holding his stomach. I didn't see any weapon on the floor. I didn't see a weapon in his hand. When I got ready to shoot him the second time there wasn't one in his hand, and there was no need.

So I redirected my attention to the threat which I thought was still there.

Q. Hold up a second. You did not see a weapon, or think you saw a weapon in his hand when, before you shot him?

A. I did, I thought there was a weapon in his hand, but I did not see one.

Q. Would you stand up and show us what position he was in when he rounded the corner Officer Karnes?

A. When he rounded the corner coming towards me, and we are point blank, he is like this (demonstrating).

Q. You have got your two hands together. He was handcuffed; is that right?

A. His hands were down like this. He was running out, and he was right up on top of me. Had I not turned around he

would have ran over top of me and that would have been the end of it.

Q. You were in a crouched position?

A. He was crouched with his hands in front, running like he was after her, and it was such a close proximity at the time, and her hands being up, I knew this was the guy.

Q. In your own mind?

A. Right.

Q. Of course it turned out not to be; correct?

A. Unfortunately.

- -

Q. Then as soon as McLenagan fell and rolled over on his side or back, what did you do next, Officer Karnes?

A. I still believed there was a threat. I still believed what Loretta Smith said,

there was someone in there with a gun. I came over to this corner.

Q. At that point did you have time for it to register that it's Kier that is giving you the trouble?

A. No. I don't really remember thinking it through that much, because we are talking, the time from the first shot to the second one maybe six to eight seconds, about eight seconds.

- -

Q. And it hit the doorpost or into the door?

A. Hit the door.

Q. So it was a total of three rounds you fired that night?

A. Yes, sir.

Q. You only fired once, though at McLenagan?

A. Right.

Q. What were you shooting at when you fired the second and third shots?

A. An armed party.

Q. But you couldn't see an armed party; isn't that correct?

A. I couldn't see him at that time.

Q. You did not know who else, if anyone, was in that room; isn't that correct?

A. No, sir. I knew that it would have to be only Kier in the room, because everyone else had left.

- -

Q. I asked you about Kier, noticing him. Do you recall in retrospect that McLenagan was handcuffed with his hands in front of him sitting down on that chair when you turned around to take McGhee out of the room?

A. Everybody was cuffed in the front.

Q. McLenagan hadn't given anybody any trouble to your knowledge?

A. I didn't really notice he was there. I didn't take notice of anybody in the room, not like Mr. Kier no bad feelings or anything like that. He hadn't been a troublemaker, because if he was I would have known it.

Q. You recall early that morning giving a statement to Mr. Crute, who was acting as an investigator, and also Internal Affairs?

A. Yes, sir. I was pretty tired at that time. I do remember going to his office.

Q. Do you recall him asking how far McLenagan was from you and you told him it was about four feet?

A. I told him three or four feet away.

Q. When you pulled out your weapon, what else did you have on you? Did you have a billy club with you, a billy stick, Officer Karnes?

A. I believe I had my flashlight, it's a six cell flashlight.

Q. A flashlight can be used as a defensive weapon as well?

A. It's not approved.

Q. But it's done; isn't that correct?

A. I guess in a pinch it could be.

Q. You did not have a night stick in your belt?

A. I don't recall a night stick.

Q. Did you have mace?

A. Yes, sir, on my belt.

Q. You said it was like six to eight seconds between the shot that your fired that hit Mr. McLenagan and you fired the second shot. How about the third shot?

That was just instantaneous, like boom-boom?

A. Boom-Boom.

Q. Your revolver carries six rounds; is that correct?

A. No, the Sig Sauer automatic, has fifteen in the clip and one in the chamber; sixteen.

Q. In your mind, Officer Karnes, you never thought you saw a gun in McLenagan's hands, you just assumed he was the man she was yelling about, and assumed he was chasing her?

A. I didn't see the gun in his hand, but, there again, it was him, and not a whole lot of time there either.

- -

Q. You meant to shoot the first round into McLenagan; it didn't accidently go off as you were raising the gun?

A. I meant to shoot him. I almost shot him twice because, see, we have two phases on that weapon. The first is a stronger trigger pull. It is very fortunate the second one you go to single action, you go from twelve pound pull to three or four pound, and as I was going to pull it, it will pull this way and it would have gone off in the hall wall, or something, because I definitely didn't want to injure him any further.

EXCERPTS FROM SHERIFF WINSTON'S DEPOSITION - CROSS

Q. Can you tell me the purpose of receiving the self defense class?

A. To defend yourself in many situations.

Q. Would such situations include a situation where an officer would be confronted with an armed felon?

A. I feel sure they would be.

Q. That would include an individual with a firearm?

A. Yes.

Q. You stated previously that your deputies are not responsible for law enforcement per se; is that correct?

A. That's correct.

Q. Could you tell me what activities you would consider to be law enforcement? What types of activities?

A. The traffic, upholding the traffic laws. On the street they are all sworn officers. If an offense is committed in their presence they are sworn by oath to do it, but as a rule our people do not do it. But they have the authority.

Q. They have the authority to make arrests?

A. They have the same authority as a policeman.

Q. They have the training that will enable to properly make an arrest?

A. Yes.

Q. Do they have the training that would properly enable them to make a traffic stop?

A. No, they are not trained in that field. Primarily my responsibility, as I indicated earlier is the jail. That's where my primary responsibilities are.

We discourage our people from enforcing the laws.

Q. Do you discourage them from law enforcement generally?

A. Yes, unless it is an offense committed in their presence.

EXCERPTS FROM THE MCLENAGAN
DEPOSITION - DIRECT

Q. At the time you were exiting the door that you had been in when you observed Mr. Kier, and just before you were shot, can you describe your profile, and how your hands were moving, and how your body was postured?

A. I was in a tucked position.

Q. Can you stand up and demonstrate and we will verbally try to describe it for the record.

A. I was probably running out like this (demonstrating).

Q. Okay, when you say "like this" you were leaning forward somewhat. Were you looking ahead?

A. Yes, I was looking ahead.

Q. And your hands were cuffed in front of you?

A. Yes, sir.

Q. Where were they in relation to your body, and, let's say your beltline.

A. Out in front.

Q. Out in front, but about at the beltline, would you agree?

A. Yes, sir.

Q. And is that the way you were postured at the point you were shot?

A. Yes, sir.

Q. And do you recall whether you straightened out at all when you were shot?

A. I do not recall.

- -

Q. Do you know how close you were to Officer Karnes at the time you were shot? Or to the person in the hall?

A. No, sir.

Q. Could it have been less than five feet?

A. I don't believe so.

Q. How do you believe it was?

A. I think it was more than five feet.

Q. Do you think it was more than ten feet?

A. No, sir.

Q. Somewhere between five and ten. Is there anyway to break that down?

A. If it was within five feet, at my height, and I know my speed when I run, I probably would have ran right over him.

Q. Do you recall his moving out of the way or touching him in any way as you went past him?

A. No.

EXCERPT FROM THE SUMMARY JUDGMENT HEARING BEFORE THE HONORABLE RICHARD L. WILLIAMS, UNITED STATES DISTRICT JUDGE

By Mr. Dybing: The Sheriff testified that all deputies received mandatory training in the performance of their duties, and Deputy Smith and Deputy Pancoast testified that all detainees were handcuffed.

The Court: While all you are teaching them to do is flee and protect themselves, aren't you?

Mr. Dybing: That is what the testimony of the Sheriff was.

The Court: Yes. So I mean, you supplied the Plaintiff with the information he needed to show that you got the training, but, I mean, anybody can run and hide and go for cover.

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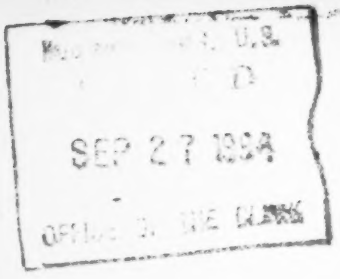

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

WILLIAM R. MCLENAGAN,
Petitioner,

v.

JOHN C. KARNES, LORETTA SMITH and
ANDREW J. WINSTON,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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Questions Presented

The Respondents disagree with the Petitioner's statement of the questions presented. The questions presented by this petition are as follows:

1. Whether the Court of Appeals for the Fourth Circuit correctly held that Respondent John C. Karnes was protected by the doctrine of qualified immunity and by the Virginia doctrine of sovereign immunity;

2. Whether the Court of Appeals for the Fourth Circuit correctly ruled that Respondent Andrew J. Winston was not liable to the Petitioner; and

3. Whether the Court of Appeals for the Fourth Circuit correctly held that Respondent Loretta Smith was protected by the doctrine of qualified immunity and by the doctrine of sovereign immunity.

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Statement of Case

Respondent Deputy Sheriff Loretta Smith ("Smith") did not permit a detainee in her custody at a drunk driving checkpoint to "wander off." Instead, the detainee "jumped up and dashed into [the magistrate's] office." App. 28.

Respondent John C. Karnes ("Karnes"), a police officer, thought that the Petitioner had a weapon in his hands when Karnes fired his weapon. App. 41. Karnes never said that he saw that the Petitioner was unarmed. He thought that the Petitioner was the man with the gun to whom Smith was referring when she yelled, "The man has got a gun." App. 31, 41-42, 47.

Summary of Argument

This case presents no issue meriting review by this Court.

Smith is entitled to qualified immunity because the Petitioner has failed to show that her conduct was in violation of clearly established federal law. When faced with a sudden emergency caused by a detainee apparently rushing to grab a weapon, she yelled to alert the police officers and other people present. The Court of Appeals for the Fourth Circuit correctly ruled that Smith's actions violated no clearly established standard of substantive due process, and that the state law claim against her for gross negligence was patently without merit.

Respondent Andrew J. Winston ("Winston"), then the Sheriff of the City

of Richmond, was properly dismissed from the case because the Petitioner's state law gross negligence claim against him was patently without merit.

Karnes is entitled to qualified immunity because his conduct was objectively reasonable under the circumstances facing him. After being alerted by Smith's warning that a man has got a gun, Karnes saw the Petitioner rushing towards him in a crouched position. Believing him to be the man with the gun, he fired his weapon. The Court of Appeals for the Fourth Circuit correctly ruled that Karnes acted well within the range of behavior expected of a police officer. The court properly dismissed the state law claims for gross negligence and assault and battery since they were patently without merit.

Argument

1. Karnes -- Qualified Immunity.

Karnes is entitled to qualified immunity if his conduct was objectively reasonable under the circumstances known to him. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1981); Mitchell v. Forsyth, 472 U.S. 511, 535 n.12 (1985); Anderson v. Creighton, 483 U.S. 635, 641 (1987). For conduct to be unreasonable, "the unlawfulness must be apparent." Anderson, 483 U.S. at 640. Summary judgment is appropriate on qualified immunity grounds if a reasonable police officer could have believed a search comported with the Fourth Amendment. Id. In addition, this Court in evaluating the conduct of police officers, has stated that "it is inevitable that law enforcement officials will in some cases

reasonably but mistakenly conclude that probable cause is present." Id., at 641. See, e.g., Graham v. Connor, 490 U.S. 386, 396-97 (1988); Slattery v. Rizzo, 939 F.2d 213, 216 (4th Cir. 1991).

Karnes heard Smith yell, "The man has got a gun." App. 37. Smith ran past him, followed closely by the Petitioner, running fast, stooped low, with his hands in front of him. App. 39. In Karnes' mind, he knew "this was the guy." App. 42. He fired his weapon, wounding the Petitioner. Clearly this was objectively reasonable conduct on the part of Karnes. He heard the deputy excitedly shout a warning about an armed man, and then Karnes was immediately confronted by a man rushing towards him. Karnes did not have time to interview this person, or make a careful visual examination to

determine whether the man was armed. Based on Smith's warning, Karnes properly believed that the Petitioner was armed.

In Slattery, a police officer at a drug arrest site ordered a car passenger to raise his hands after the officer saw him grasp an object. The passenger refused, and turned towards the officer, who then fired at him. The Fourth Circuit applied qualified immunity to the police officer, finding his conduct to be objectively reasonable under the circumstances. 939 F.2d at 215.

Similarly, Karnes' split-second decision to fire his weapon was objectively reasonable under the standards set forth in Slattery, and the Fourth Circuit properly ruled that he was entitled to the protection of qualified immunity.

The claims against Karnes for gross negligence and assault and battery must likewise fail, since his actions were neither wrongful nor negligent. Karnes was entitled to sovereign immunity under Virginia law, meaning that the Petitioner must show gross negligence to prevail. Colby v. Boyden, 400 S.E.2d 184 (Va. 1991). Karnes, however, was faced with the need to make a split-second decision. Under these circumstances reasonable minds could only agree that his actions were justified.

2. Winston -- No Liability.

The Petitioner seeks to hold Winston liable for Smith's allegedly gross negligence. However, since Smith, when confronted with an apparently armed man, yelled for help in keeping with her training, neither she nor Winston may be

liable under a gross negligence theory, since her conduct did not amount to a complete neglect of the safety of another. Frazier v. City of Norfolk, 362 S.E.2d 688 (Va. 1987).

3. Smith -- Qualified Immunity.

Smith is entitled to qualified immunity if a reasonable deputy could have believed that her conduct was not in violation of clearly established federal law.[1] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1981); Mitchell v. Forsyth, 472 U.S. 511, 535 n.12 (1985); Anderson v. Creighton, 483 U.S. 635, 641 (1987).

A deputy sheriff on guard duty is entitled to the protection of qualified immunity. See, e.g., Belcher v. Oliver, 898 F.2d 32, 35 (4th Cir. 1990). The

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[1] Violations of state law do not state a cause of action under § 1983. Davis v. Scherer, 468 U.S. 183 (1984).

Petitioner's argument that Smith was engaged only in ministerial duties on the night in question, and therefore not entitled to claim qualified immunity, collapses of its own weight -- the very essence of his claim relates to Smith's exercise of discretion in performing guard duty.

The Petitioner apparently concedes that Smith violated no federal law when she sounded the alarm to the effect that a detainee had a gun, because he has identified no cases holding otherwise. The Petitioner's argument that Va. Code § 15.1-138 creates a federally protected right is novel -- but it by no means states clearly established law of which a reasonable deputy would be aware.

The Petitioner also concedes that, instead of a federal claim against Smith,

at best he states a claim for negligence. Pet. at 26. However, the Court of Appeals for the Fourth Circuit has noted that the Supreme Court has left open the question of whether conduct short of intentional acts, such as recklessness or gross negligence, triggers protection of the due process clause. Temkin v. Frederick County Comm'rs, 945 F.2d 716, 719 (4th Cir. 1991), cert. denied, 112 S. Ct. 1172 (1992).

Absent a claim of violation of clearly established law, Smith is entitled to qualified immunity.

As for the gross negligence claim against Smith, she is plainly entitled to sovereign immunity for her performance of discretionary duties; the Petitioner must for that reason show gross negligence in order to prevail. Colby v. Boyden, 400

S.E.2d 184 (Va. 1991). But the Petitioner concedes that Smith yelled out "The man has got a gun." This alone shows slight diligence, or scant care, sufficient to defeat a claim for gross negligence. Frazier v. City of Norfolk, 362 S.E.2d 688 (Va. 1987).

Conclusion

This case does not present a close question of law, and offers this Court no opportunity to explain any unclear premises of law. For the reasons stated, the Respondents respectfully request the Court to deny the Petition for a Writ of Certiorari.

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